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[Pillow v. Bechtel Construction](#), 87-ERA-35 (Sec'y Feb. 4, 1994)

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DATE: February 4, 1994  
CASE NO. 87-ERA-35

IN THE MATTER OF

JAMES CARROLL PILLOW, JR.

COMPLAINANT,

v.

BECHTEL CONSTRUCTION, INC.

RESPONDENT.

BEFORE: THE SECRETARY OF LABOR

ORDER GRANTING CLARIFICATION AND REQUIRING SUBMISSION  
OF WRITTEN SETTLEMENT AGREEMENT

This case arises under the employee protection provision of the Energy Reorganization Act of 1974, as amended (ERA), 42 U.S.C. § 5851 (1988). In an earlier Decision and Order of Remand (Remand Order), the Secretary found that Respondent Bechtel Construction, Inc. (Bechtel) violated the ERA when it switched Complainant James Pillow's work shift and selected him for layoff. The Secretary remanded to the Administrative Law Judge (ALJ) to take evidence on and recommend the amount of back pay and compensatory damages (if any) to which Pillow is entitled, and to calculate the costs and an attorney fee incurred in bringing the complaint.

1. Motions for Clarification and for Stay

Shortly after the Remand Order was issued, Pillow moved to clarify a statement in footnote 3 of that order. Bechtel opposed the motion to clarify, and asked the Secretary to vacate the Remand Order and adopt the Administrative Law Judge's (ALJ) earlier recommended decision on the merits of the complaint. Bechtel filed a petition for review of the Remand Order in the United States Court of Appeals, *Bechtel Construction Co. v.*

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*Secretary of Labor*, No. 93-4867 (11th Cir.), [1] and asked the Secretary to stay the proceedings on remand pending the ruling on Pillow's motion for clarification.

2. The ALJ's Recommended Decision and Order on Damages

The ALJ scheduled a hearing on remand for November 9, 1993, at which time the parties advised that they had reached an agreement on the issues to be resolved on remand. R.D. at 1. Their agreement did not settle the issue of liability, and Bechtel indicated that it would seek judicial review of the underlying decision on the merits. T. 2-3.

The parties did not submit a signed settlement agreement, but rather, relied "upon statements made on the record to encompass the entire agreement." R.D. at 1. Pursuant to their agreement, if any part of the settlement is not accepted by the Secretary, the entire agreement will be void and the case should proceed for an evidentiary hearing on damages and related issues. T. 27. The parties agreed that Bechtel would pay Pillow \$25,000 in back pay and interest, T. 5, \$25,000 in compensatory damages, T. 7, and would pay Pillow's attorney \$250,000 to cover the attorney fee and costs. T. 15.

The ALJ found the agreement to be fair, adequate, and reasonable and recommended its acceptance. R.D. at 2.

3. Order Requiring Submission of Written  
Settlement Agreement

Pillow submitted a letter to the Secretary in which he requested at least a doubling of the amount of award he is to receive pursuant to the settlement. The letter does not indicate service on the other parties, and therefore I have appended it to this decision.

According to the ERA, "the Secretary may not enter into a settlement terminating a proceeding on a complaint *without the participation and consent of the complainant*" (emphasis added). 42 U.S.C. § 5851(b)(2)(A) (1988). The Secretary will not approve a settlement unless it is submitted in writing and signed by all parties, or the record contains an unequivocal declaration by the parties that they have agreed to all the terms of a settlement and stating the terms clearly. *Hasan v. Nuclear Power Services, Inc.*, No. 86-ERA-24, Order to Show Cause, Mar. 21, 1991, slip op. at 2. In light of Pillow's recent letter, there appears not to be consent of all parties to the settlement terms addressed at the hearing on remand.

Accordingly, I will order the parties to submit a written settlement agreement signed by Complainant, Complainant's attorney, and an authorized signatory for Respondent. If such an agreement is not submitted, or if any party indicates that he or it did not agree to the settlement award, Complainant Pillow will

have to establish his damages by a preponderance of the evidence at a future hearing on remand.

4. Stay Denied

In view of the ALJ's having proceeded with this case, the request for stay of the hearing on remand is denied as moot.

5. Clarification Granted

In his motion for clarification, Pillow correctly pointed out that the Secretary erred in stating that no one asked former Bechtel employee Larry Booth whether he had warned Pillow about a set up. See Remand Order at 6, n.3. Rather, Bechtel's counsel asked Booth whether he gave such a warning, and Booth denied it. RX 18 p. 36.

I will grant the motion to correct the misstatement of the evidence in footnote 3 of the Remand Order. Upon consideration of Pillow's motion to clarify and Bechtel's response, and upon a further review of the record in this case, footnote 3 on page 6 of the Remand Order is amended to read as follows:

3/ Booth, who had left Bechtel's employ and moved to Arizona, was not a witness at the hearing. See RX 18 at 5. In a pre-hearing deposition, Booth denied that he told Complainant about being "set up." RX 18 at 36.

This revision does not alter any of the other findings or conclusions in the July 19, 1993, Remand Order.

In its response to the Motion for Clarification, Bechtel argued that the misstatement about Booth's denial of warning Pillow about a set up revealed "a clear error that permeates and taints the Secretary's entire analysis of the case and requires that the Secretary vacate the Decision" and adopt the ALJ's earlier recommended decision in Bechtel's favor. Resp. Response to Comp. Motion for Clarification at 1, 12. I will explain briefly that Bechtel's assumption of error is incorrect.

Bechtel argues that it was improper for the Secretary to believe that Pillow was warned about a set up to get him fired because "it was the ALJ who observed Mr. Pillow and other witnesses testify and who is in the best position to determine his 'credibility.'" Resp. Response to Comp. Motion for Clarification at 2. But the ALJ did not discredit Pillow's testimony. [2] The ALJ was not present for Booth's deposition and it appears that he was unaware of the contradiction in testimony that the deposition revealed, because he found that "Complainant's testimony and allegations throughout the record do not contradict Respondent's evidence." ALJ Dec. at 4. The ALJ's only mention of Larry Booth's deposition testimony concerned other issues: whether Pillow got along with his coworkers or interfered with the work of the Safety Department.

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ALJ Dec. at 9.

There was a solid basis in the record to credit Pillow's testimony about the warning of a set up, since the ALJ did not discredit Pillow's testimony in general or his testimony about such a warning in particular. Pillow maintained that Booth had warned him, both in a prehearing deposition, see Resp. Response to Comp. Motion for Clarification at 2 n.1, and again at the hearing on the merits. T. 105. Therefore, the correction of

the misstatement about whether Booth denied having warned Pillow does not alter the remainder of the Remand Order or its outcome.

ORDER

1. Complainant's Motion for Clarification is granted. The July 19, 1993, Decision and Order of Remand is clarified as set forth in Part 5 above.

2. Respondent's Motion for Stay is denied.

3. Within 60 days of receipt of this Order, the parties shall submit a signed, written settlement agreement setting forth the terms of their settlement. If no such agreement is submitted, a further order will issue authorizing the Administrative Law Judge to proceed with a hearing on remand to resolve the outstanding issues of damages, costs, and an attorney fee.

SO ORDERED.

ROBERT B. REICH  
Secretary of Labor

Washington, D.C.

[ENDNOTES]

[1] The petition was dismissed as premature in November 1993.

[2] The ALJ made only a routine statement concerning witness demeanor: "The following findings of fact and conclusions of law are based upon my observation of the appearance and demeanor of the witnesses who testified at the hearing and upon an analysis of the entire record, arguments of the parties, and applicable statutes, regulations, and case law." ALJ Dec. at 3.